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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963.

No. 331

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, - - - - - - - - Appellants,

versus

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City of the Commonwealth of Kentucky,
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, composed of Jack Holland, Emery Cardwell, Fred Austin, P. P. Durnal, O. C. Coleman, and Leonard Hildreth, Chairman (Sued Individually as Official Members and as a Political Subdivision) - Appellees.

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF KENTUCKY,
CIVIL ACTION No. 922, BOWLING GREEN, KENTUCKY.

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WESTERN-GROTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term 1963.

No. _____

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH,
Suing Jointly, Severally and as Representatives of a Class Similarly Situated. - - - - - *Appellants.*

v.

CITY OF BOWLING GREEN, KENTUCKY, A Second Class City of the Commonwealth of Kentucky.
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky composed of Jack Holland, Emory Cardwell, Fred Austin, P. P. Dumas, C. C. Coleman, and Leonard Hildreth, Chairman (Sued individually as official members and as a Political Subdivision) - - *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF KENTUCKY, CIVIL ACTION No. 933, BOWLING GREEN, KENTUCKY.

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT.

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May it please the Court:

I.

STATEMENT OF SUBJECT MATTER.

This is an action, filed in the United States District Court for the Western District of Kentucky seeking to enjoin the City of Bowling Green, Kentucky and the Water, Sewer and Sanitation Commission from issuing and selling bonds for the construction of a sewer system, sewer treatment plant, water system and water pumping station expansion projects on the ground that failure to submit the issue to a vote constituted a violation of appellant's civil rights.

This cause is now before the Supreme Court of the United States on an appeal from a judgment of the United States District Court for the Western District of Kentucky, sitting as a three judge panel, dismissing the complaint.

Appellees have filed a Motion to Affirm the judgment of the District Court.

II.

STATEMENT OF THE CASE.

The General Council, the legislative body of the City of Bowling Green, Kentucky, enacted ordinances authorizing the issuance and sale of $10,000,000.00 in bonds for the purpose of defraying the cost of construction and expansion of a sewer system, sewer treatment plant, water system and water pumping stations.

These bonds, under the specific terms of the ordinances, did not constitute an indebtedness of the City of Bowling Green, Kentucky, but were to be retired solely from revenue derived from the sale of utility services to be rendered by the municipality, and were authorized by Chapter 58 of the Kentucky Revised Statutes.

Complaint and ordinances filed as exhibits. See Item 2 of record.

The authorization for the issuance and proposed sale of these bonds was not submitted for determination by a vote of the people.

Stipulation of counsel.

III.

STATEMENT OF QUESTION INVOLVED.

Did the Legislative bodies of the City of Bowling Green, Kentucky, violate the civil rights of the appellants by enacting an Ordinance for the issuance and sale of revenue producing bonds for the purpose of financing the construction and expansion of a sewer system, treatment plant, water system and pumping stations without, first, submitting the matter to the registered voters of the City of Bowling Green.

IV.

ARGUMENT.

1.

No Federal Question Involved.

The face of the pleadings, exhibits, record, Notice of Appeal and Jurisdictional Statement show that no federal question is involved.

The appellants seek to invoke federal jurisdiction upon the erroneous assumption that the facts herein constitute a violation of appellant's civil rights.

The statutes upon which appellants rely as set forth in the Jurisdictional Statement, pages four to seven, have no application to the facts of this case.

Appellants cite Section 157 of the Constitution of Kentucky as the authority upon which they rely in this case. This section has been interpreted by the Court of Appeals of Kentucky in numerous cases, cited hereinafter, as not requiring a vote of the people for the issuance of revenue producing bonds under the provisions of Chapter 58 of Kentucky Revised Statutes for the reason that the bonds, which are to be retired from revenue solely derived from the sale of utility services to be rendered by the municipality, do not create an "indebtedness" within the meaning of Section 157 of the Constitution of Kentucky.

Appellants rely upon Section 1 of the Fourteenth Amendment.

The City of Bowling Green, Kentucky, in providing for the issuance of bonds to finance the above men-

tioned public project is proceeding by due process of the law as provided in Chapter 58 of Kentucky Revised Statutes, which has been held constitutional by the Court of Appeals of Kentucky, and is applying the ordinances equally and without discrimination among all of its citizens, thus granting equal protection of the laws to all.

The Fourteenth Amendment of the Constitution of the United States has been interpreted on many occasion by the Supreme Court. Its provisions relate only to "invidious discrimination."

In the case of Morey v. Doud, 77 Supreme Court 1344, the Supreme Court of the United States held that "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination." In this case the Court summarized the rule.

Appellants cite Section 1 and Section 5, Fourteenth Amendment of the United States Constitution. We fail to see the application to this case.

Nothing can be found in the subject ordinances or State Statute, which attempts to deny anyone the right to vote "on account of race, color or previous condition of servitude".

If appellants can invoke Federal jurisdiction by simply alleging violation of civil rights, without showing discrimination, then there is no case which could not be brought into Federal Court by such procedure. Under the law, as we understand it, there must be a showing of "invidious discrimination" between persons before Federal jurisdiction can be invoked under

the Fourteenth and Fifteenth Amendments to the United States Constitution and under the laws relating to civil rights.

Appellants cite the case of Baker v. Carr, (1962) 369 U. S. 186, 82 Sup. Ct. 691, in support of their contention that this question involves a Federal issue.

In that case we find that there was an obvious discrimination between the city voter and the rural voter, and the Court held that failure of the State Legislature to fairly and reasonably re-apportion legislative districts to provide equal representation to each voter violated the constitutional rights of the voters of Tennessee. There was, in that case, an "invidious discrimination" between voters.

In the case at bar we find no application of the principles set out in the Baker v. Carr case, *supra*, as there is no discrimination between voters or persons in our case. All are being treated alike.

Appellants cite one other case, the case of Monroe v. Pape, (1961) 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 492. This case relates to a suit against police officers who had been engaged in practices of unreasonable searches and seizures. The plaintiffs invoke the provisions of Title 42, U.S.C.A. Section 1983, just as the appellants sought to invoke it in the case at bar.

The Supreme Court held in that case that a municipal corporation was not a "person" within the meaning of the act.

We quote from the case of Monroe v. Pape, *supra*, as follows:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within Federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'persons' was used in this particular act to include them."

Thus we reason that the City of Bowling Green is not included within the meaning of the word "person" as used in Title 42 USCA 1983, and that statute therefore has no application to this case.

Further, the case of Monroe v. Pape, *supra,* related to a civil action against Chicago policeman who had engaged in unreasonable searches and seizures. Illinois law had made no provision for civil action in such cases.

The distinction between the case aforesaid and the case at bar is that unreasonable searches and seizures are prohibited under the provisions of the Fourth Amendment of the Constitution of the United States, while in the case at bar the Federal Constitution makes no reference to the right of a resident of the city to vote on the issuance of local revenue producing bonds.

The Supreme Court pointed out in the case of Monroe v. Pape, *supra,* that one of of the prevailing reasons for the passage of Title 42 U.S.C.A. 1983, was to protect against deprivation of the rights of citizens by reason of prejudice, passion, neglect or intolerance. Nothing of that character is apparent in the case at bar.

Further, it has been held in the case of Carson v. Sewer Commission of Brecton, 182 U. S. 398, 21 S. Ct.

860, that the rates fixed by the municipality for services rendered by a municipally owned utility do not deprive the user of property of his rights under the law nor is it a taking without due process of law, but is a matter of public policy for the legislature, since the property owner receives a special benefit from the construction of the sewer in the privilege of making use of it.

The due process of law, and the equal protection of laws as guaranteed in the Fifth, Fourteenth and Fifteenth Amendments of the United States Constitution prohibit discrimination and arbitrary treatment. There is no discrimination or arbitrary treatment involved in the Ordinances and State Statute which are the subject of this action. The statutory and constitutional laws of the State of Kentucky, as interpreted by the Court of Appeals of Kentucky have been fully obeyed and equally applied under all of the definitions of "due process", "equal protection" of the law and "civil rights". The City Ordinances and Chapter 58 of Kentucky Revised Statutes are valid and constitutional under both state and federal laws.

2.

The Constitution of the United States and the Federal Statutes Do Not Require a Vote of the People to Authorize the Issuance and Sale of Revenue Producing Bonds by a Municipality.

We can find no provision of the Federal Constitution which requires a vote of the people in the issuance of bonds by a municipality or which provides for a vote of the people on a local issue.

The case of William H. Pope v. John M. C. Williams and John W. Harper, Officers of Registration, constitute the Board of Registry for the Election District #7 of Montgomery County, Maryland (1904) 24 S. Ct. 573, 48 L. Ed. 817, deals with this subject.

We quote from this case:

> "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall 162, 22 L. Ed. 627. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the say may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minon v. Happersett,

21 Wall 162, 22 L. Ed. 627, such persons were allowed to vote in several of the states upon having declared their intention to become citizens of the United States. Some states permit women to vote; others refuse them that privilege. A state so far as the Federal Constitution is concerned might provide by its own constitution and laws that none but native born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the Federal Constitution already stated, although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Fed. Const. Art. 1 and 2; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17. But the elector must be one entitled to vote under the state statute. Id. See also Swafford v. Templeton, 185 U. S. 487, 491, 46 L. Ed. 1005, 1007, 22 Sup. Ct. Rep. 783. In this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon. The question whether the conditions prescribed by the state might be regarded by others as reasonable or unreasonable is not a Federal one. We do not wish to be misunderstood, however, as intimating that the condition in this statute is unreasonable or in any way improper."

The above case was decided before the adoption of the Nineteenth Amendment, which provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account or sex."

No further provisions of the Federal Constitution relate to the right of the state to determine the right of its citizens to vote on local issues.

Thus we see that the Federal Constitution does not require a vote of the people on a bond issue. It is true that the Federal Constitution prohibits discrimination on account of race, color, previous condition of servitude and sex, but the above case holds that the state has the right to determine the requirements of voting except that it cannot violate the above mentioned prohibitions against discrimination. Further it follows that the Courts of each state have the right, within the above limitations, to interpret its own constitution and statutes relating thereto.

In regard to the right of the individual to vote, Section 2004 of the Civil Rights Act of 1957, 42 U.S.C.A. 1971 provides as follows:

> "(a) All citizens of the United States, who are otherwise qualified by law to vote at any election . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any state or territory, or by or under its authority to the contrary notwithstanding."

We have asked appellants' counsel to point out in what way the ordinances and statute involved in this case have violated the civil rights of the appellants with regard to their voting privileges as defined in the Civil Rights Act above set out. In the case at bar there has been no discrimination as to race, color, pre-

vious condition of servitude, or sex. There are no provisions of Federal law which require that appellants be given a right to vote on the issuance of revenue producing bonds for the construction of public projects.

3.

The Ordinances and Statute in Issue Comply With the Provisions of Section 157 of the Kentucky Constitution as Interpreted by the Court of Appeals of Kentucky.

The only issue left for discussion is: Were appellants denied equal protection of laws or due process in the issuance of bonds under the provisions of Section 58.010 to 58.140 of Kentucky Revised Statutes, Appendix Two Jurisdictional Statement and Section 157 of the Kentucky Constitution?

The bonds were issued pursuant to Chapter 58 of Kentucky Revised Statutes which provides that any governmental agency may acquire, constitute, maintain, add to and improve any public project within or without the territorial limits of such governmental agency, and, for the purpose of defraying the cost thereof, may borrow money and issue negotiable revenue producing bonds. It further provides that a city is a "governmental agency" within the meaning of the statute.

The Court of Appeals of Kentucky has held, in all cases raising this issue, that revenue producing bonds issued pursuant to Chapter 58 K.R.S., Appendix Two, Pages 23-29, Jurisdictional Statement do not create an "indebtedness" within the meaning of Section 157 of

the Kentucky Constitution. Among the most recent cases are the following authority:

McKinney v. City of Owensboro, 203 S. W. 2d 24, 305 Ky. 253;

Dunn v. City of Murray, 208 S. W. 2d 309, 306 Ky. 426;

Francis v. City of Bowling Green, 82 S. W. 2d 804, 259 Ky. 525;

Veail v. City of Louisville and Jefferson County Metropolitan Sewer District, 197 S. W. 2d 413;

and the other cases cited in the Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Western District of Kentucky. Pages 19-22 of Appendix One to Jurisdictional Statement.

We respectively point out to the Court that the same subject matter contained in this action was involved in a State action filed in the Warren Circuit Court of Kentucky styled Ada Parsley, Sinclair Davis, et al v. City of Bowling Green, Kentucky. In this action the appellants intervened. A judgment adverse to the appellants was entered. Appendix Three, Jurisdictional Statement, Pages 29-32.

The appellants did not appeal to the Court of last resort in Kentucky, the Court of Appeals, but permitted the judgment of the Warren Circuit Court to stand. Thus, appellants failed to exhaust their state remedies.

We submit that the Court of Appeals of the Commonwealth of Kentucky is the court of last resort to which appellants should have addressed their appeal

from the decision of the Warren Circuit Court inasmuch as the Court of Appeals of Kentucky is the proper forum for the interpretation of the Kentucky Constitution.

Appellants failed to show in what respect the provisions of Section 157 of the Kentucky Constitution, as interpreted by the Court of Appeals of Kentucky, are violative of the provisions of the United States Constitution.

V.

SUMMARY.

The motion to affirm the judgment of the United States District Court for the Western District of Kentucky should be sustained for the following reasons:

1. No Federal question is involved.

2. It is apparent from the complaint filed by the appellants in the District Court and the exhibits attached thereto, which are a part of this record, that no discrimination is involved in this case.

3. While the appellants may invoke the term "Civil Rights", this alone does not bring this case within the jurisdiction of the Court unless the record shows that the ordinances and statute attacked resulted in an "invidious discrimination" on account of race, color, previous condition of servitude or sex. None of these elements appear in this record.

4. Appellants failed to cite, in the Jurisdictional Statement, any statutory or constitutional authority bringing this case within the jurisdiction of this court.

5. The Constitution of the United States and the Federal statutes do not require a vote of the people to authorize the issuance and sale of revenue producing bonds by a municipality.

6. The question as to whether or not there should be a vote to authorize the issuance of revenue producing bonds is purely an issue to be determined by the Courts of Kentucky, which have already upheld the validity and constitutionality of the bonds under their interpretation of the statutes and constitution of the State of Kentucky.

We, therefore, respectfully request the Court to affirm the judgment of the United States District Court for the Western District of Kentucky, under Rule 16 of the Rules of the Supreme Court, on the ground that no federal question is involved and it is manifest that the question on which the decision of this cause depends is so unsubstantial as not to need further argument.

Respectfully submitted,

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PROOF OF SERVICE.

For appellees, Squire Ogden, of counsel, certifies that on the day of August, 1963 he served the foregoing Brief in Support of Motion to Affirm by mailing a copy in the United States Mails, postage prepaid, to the respective appellants and counsel of record, to-wit: (1) Sinclair Davis, 1148 High Street, Bowling Green, Kentucky, R. V. "Bob" Schultz, 807 Fairview, Bowling Green, Kentucky, and Loyd Martin Finch, 278 Longview Drive, Bowling, Green, Kentucky; (2) and their attorneys, Hon. John Ward, Danville, Kentucky, Hon. Leland Logan, Myers Building, Bowling Green, Kentucky, Hon. A. O. Scafuro, 2 West Allendale Avenue, Allendale, New Jersey, Hon. C. L. Bell, 601 Center Building, Louisville, Kentucky and Hon. Marion Vance, 103 East Main Street, Glasgow, Kentucky. Certificate of service is made pursuant to Rule 33 (3) (b), Rules of the Supreme Court of the United States.